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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 675

October Term, 1962

PAUL E. RHODES,

Petitioner,

vs.

NORVAL HOUSTON, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PAUL E. RHODES, *Pro Se.*

Paul E. Rhodes, Pro Se
Box 47
Howe, Nebraska.

Telephone None.

GANT PUBLISHING CO., Lincoln, Nebraska

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Paul Rhodes, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on November 29th, 1962.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals, reprinted in Appendix A hereto, is reported at 308 F. 2d — (1962) and is reprinted in Appendix A hereto. The Judgment of the Court of Appeals is reprinted as Appendix B.

The opinion of the District Court is reported and published at 202 F. Supp. 624, and in printed record in this case, pages 58 to 83.

JURISDICTION

The judgment of the Court of Appeals was entered on November 29th, 1962, in accordance with opinion entered that day. The jurisdiction of this Court is invoked under 28 U. S. C. #1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner, stated a claim for damages and or equitable relief under the Civil Rights Act, R. S. #1979, 42 U. S. C. A. 1983, 1985, 1986, when he alleged that a state judge, judges, and prosecuting officials, including county attorney and Attorney General and special assistants conspired to deprive him of federal constitutional rights and tried him in *ABSENTIA* when he was not present for criminal contempt of court alleged not to have been committed in the presence of the court, and contempt not a crime, in his absence sentenced him to nine months HARD LABOR in the Nebraska State Penitentiary, and thereafter a Court of General Jurisdiction after he was arrested without a warrant determined said judgment void, granted a writ of Habeas Corpus and later discharged him from said judgment and commitment based thereon, and thereafter at direction of prosecuting attorney and Attorney General and others, Sheriff and others without any further order of any court again without a warrant rearrested him and under the same commitment committed him to the Hard Labor in the Penitentiary, and thereafter after he has served said sentence at hard labor and been released from the penitentiary the Clerk of Court in the Contempt proceeding without any order of direction

therefore from any judge issues a second Commitment but no Warrant to the Sheriff and the sheriff pursues the petitioner to another County and on private property without a warrant again re-arrests him and again commits him to the penitentiary at hard labor to again serve said sentence, and he was never charged with or convicted of a crime.

2. Whether petitioner, stated a claim for damages and or equitable relief under the Civil Rights Act, R. S. #1979, 42 U. S. C. A. 1983, 1985, 1986, when he alleged that state judges, prosecuting officials, including Sheriffs, and Penitentiary Wardens and Employees, including County Attorney, and Attorney General and law enforcement officers acquired no jurisdiction by reason of TRIAL IN ABSENTIA in a state Court Contempt of Court proceeding and Passing of Sentence in Absentia, all subsequent actions of Clerks of Court and Law Enforcement officials including Sheriffs and Penitentiary Wardens were without Jurisdiction and therefore none of the subsequent actions alleged in the complaint after November 21, 1960 Trial in Absentia had jurisdiction for their actions and therefore no IMMUNITY could attach to Law Enforcement Officials including Sheriffs, Penal Institution Employees and Clerks of Court.

3. Whether a complaint setting forth the above acts and the above conspiracy plus all other elements of the tort defined by R. S. #1981 and 42 U. S. C. A. 1985 states a claim under that section.

4. Whether Due Process and Equal Protection of the Law requires in a state Court criminal contempt proceeding that the accused must be confronted by the witnesses against him.

5. Whether in a state court criminal Contempt proceeding the court has power, jurisdiction, and authority to sentence and commit to the penitentiary at hard labor, contempt of court not being a crime, 13th and 14th Amendments U. S. Constitution.

6. Whether law enforcement officers have power, authority or jurisdiction in violation of the 14th amendment to arrest petitioner without a warrant or order of the court authorizing the arrest.

7. Whether granting a writ of Habeas Corpus on ground the contempt judgment by trial in absentia and sentence to penitentiary at hard labor for nine months and a subsequent discharge and setting at large from custody of petitioner and further holding of the court in said habeas corpus proceeding that the commitment issued by the Clerk of the District Court of Morrill County was not a warrant or valid order of Commitment for arrest was a bar to re-arrest, subsequent arrest using the same order of commitment for claimed authority.

8. Whether petitioner is entitled to injunctive relief against public officials including the Attorney General of the State where his Federal Civil Constitutional rights are violated and he is committed to involuntary servitude without the conviction of a crime.

9. Whether state Court judges are immune to the Federal Civil Rights Act and the United States Constitution where they violate petitioner's federal constitutional rights.

10. Whether when prosecuting attorneys violated petitioner's Federal Civil and Constitutional rights, and did so knowingly or even unknowingly, and with conspiracy with others to violate petitioner's civil rights are immune

to Federal Civil Rights Act, and the United States Constitution.

11. Whether Wardens and Penal Institution Employees are immune to the United States Constitution and the Federal Civil Rights Act where they violate petitioner's Federal Constitutional Rights, and particularly the 13th Amendment and 14th Amendment of the United States Constitution.

12. Whether Law enforcement officers are immune to the United States Constitution and Federal Civil Rights Act when in a criminal Contempt proceeding, not a crime, after granting of a writ of Habeas Corpus on grounds judgment of trial in Absentia is void and the Court in a Contempt proceeding did not have Power, Authority or Jurisdiction in a state court contempt proceeding to sentence to the *penitentiary at hard labor* for nine months, and a subsequent discharge from custody in said Habeas Corpus proceeding on the grounds the court had not ordered the arrest and that the arrest was not by virtue of any warrant or order of commitment said officers proceed without any further order of court in the contempt proceeding to arrest and deprive petitioner of his liberty twice and commit him twice thereafter to hard labor in penitentiary to twice serve said sentence for contempt at hard labor, contempt not being a crime.

13. Whether the motion to dismiss like the demurrer for which it is a substitute is addressed to the sufficiency of the allegation of the complaint, and for that purpose whether the facts set forth in the complaint stood admitted, and whether or not the trial court was at liberty to consider the affidavits attached to motions to dismiss and other showing of documents made by respondents after the motion was argued and submitted, and whether

the trial court is at liberty in considering motion to dismiss to go about the state in search of documents and evidence to defeat the allegations of the complaint, or whether he is limited to the allegations alleged in the complaint for the purposes of the Motion to Dismiss.

14. Whether Judicial immunity extends to clerks of Court where they perform acts that result in Deprivation of Petitioner's Federal Civil and Constitutional rights, and said acts are performed without order or direction of the court, and in an action where the Court had acquired no jurisdiction by reason of trial in absentia.

15. Whether law enforcement officers performing orders and exceeding the authority and direction of the order issued by the clerk of the court where they had not been ordered and directed to pursue petitioner and deprive him of his liberty, and the clerk issued no warrant for such purpose, do so, violation State Statute Section 29-2809, R. R. S. Neb. 1943, prohibiting them from arresting petitioner are immune to the Federal Civil Rights Act and the United States Constitution, and whether their acts were in violation of and repugnant to the 14th Amendment and the 4th Amendment of the United States Constitution.

16. Whether in Contempt of Court proceeding sheriff, deputy sheriff and police officers are liable under Federal Civil Rights Act for acts performed in excess of authority of Order of Commitment in pursuing petitioner to another County and depriving him of his liberty and arresting him without a warrant where the order of commitment and statute do not authorize the said officers to pursue and arrest and deprive petitioner of his liberty for the purpose of executing the said commitment.

17. Whether immunity, if any, is lost when acts are

done in furtherance of conspiracy to deprive petitioner of Federal, Civil and Constitutional rights.

18. Whether the judgment of the state court (R. 9) granting the Writ of Habeas Corpus determining State Court was without jurisdiction in Contempt of Court proceeding where the court conducted a *trial in absentia* on November 21, 1960 and the judgment Void is binding on the United States District Court that the Court was without jurisdiction on November 21, 1960 in the absence of the body accused, this petitioner, is Re Judicata and binding on the United States District Court in the case at bar, a Civil Rights Act, R. S. #1979 (42 U. S. C. A. ##1983, 1985, 1986) and further a Bar to subsequent arrest of petitioner.

19. Whether the federal courts are bound by the determination of State Supreme Court that Sheriffs and Law enforcement officers are liable in damages and when they violate Nebraska Statute 29-2809, R. R. S. Neb. 1943 barring re-arrest for the same offense after any discharge in Habeas Corpus and therefore would not be immune to an action for damages brought under Federal Civil Rights Act to collect damages for subsequent Arrest, and re-arrest after setting at large in Habeas Corpus.

STATUTES INVOLVED

R. S. #1979 (42 U. S. C. A. #1983):

> "Every person who, under color of any statute, or ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Other statutory and constitutional provisions involved are:

28 U. S. C. (1958 ed.) #1343 (28 U. S. C. A. #1343).
28 U. S. C (1958 ed.) #1331 (28 U. S. C. A. #1131).
R. S. #1980 (42 U. S. C. A. 1985 (3)).
R. S. #1981 (42 U. S. C. A. #1986).
U. S. Constitution, Amendments 4, 5, 6, 8, 13, 14.

These provisions are reprinted in Appendix D to this petition.

Also involved are section of the Nebraska Statutes, R. R. S. Neb. 1943:

Section 29-102, R. R. S. Neb. 1943.
Section 29-2001, R. R. S. Neb. 1943.
Section 29-2201, R. R. S. Neb. 1943.
Section 29-2303, R. R. S. Neb. 1943.
Section 29-2401, R. R. S. Neb. 1943.
Section 29-2801, R. R. S. Neb. 1943.
Section 29-2806, R. R. S. Neb. 1943.
Section 29-2809, R. R. S. Neb. 1943.

STATEMENT

Petitioner brought this action for damages and equitable relief, alleging violation of his Fourteenth Amendment rights under the Civil Rights Act, R. S. #1979, 1980, 1981 (Federal jurisdiction was invoked in the District Court under 28 U. S. C. A. #1331 and 1343 and 42 U. S. C. A. #1983, 1985, 1986 and Amendments IV, V, VI, VIII, XIII, and XIV to the Constitution of the United States) (R. 3 & 4) in the United States District Court for the District of Nebraska against Law Enforcement Officers, (police officers) penal institutional employees, clerks of court, prosecuting attorneys, and state court judges. On January 29,

1962, the District Court dismissed the complaint for failure to state a claim sustaining 15 separate motions of defendants to dismiss. Leave to amend was denied (R. 15). On November 29, 1962, the Court of Appeals for the Eighth Circuit affirmed for the same reason.

The Complaint asserted:

On November 21, 1960 the petitioner over his protect was tried *IN ABSENTIA* for Contempt of Court. The petitioner was not present in person nor was he represented by counsel (R. 6). The matter was heard on the Merits, and the State introduced evidence in the absence of this petitioner (R. 7), adjudging petitioner guilty of Contempt of Court (Contempt of Court not a crime in Nebraska), and sentenced petitioner to nine months *Hard Labor* in the Nebraska State Penitentiary (R. 7). On November 25th, 1960 the Clerk of the District Court of Morrill County in the complete absence of any mittimus or other direction by the District Court issued an order of Commitment (R. 7).

On January 16, 1961 under color of the Order of Commitment and at specific direction of respondents James L. Macken, Morrill County Attorney, and Norval Houston, Morrill County Sheriff, the sheriff of Cheyenne County placed the petitioner under arrest and imprisoned him (R. 9).

On January 16, 1961 the District Court of Cheyenne County, Nebraska, John H. Kuns, District Judge granted petitioner a writ of habeas corpus upon application on the grounds the judgment of the District Court of Morrill County November 21, 1960 violated Due Process Clause of the Fourteenth Amendment of the United States Constitution (R. 38) (R. 9) and the Thirteenth Amendment of

the United States Constitution (R. 9) (R. 36), and holding that the District Court of Morrill County, Nebraska, on November 21, 1960 had no jurisdiction, power or authority to pronounce judgment and sentence of fine and imprisonment in the Nebraska State Penitentiary at Hard Labor (R. 9) (R. 36). And on the further grounds that the District Judge and District Court had no jurisdiction in the absence of this petition to try said action and said trial in Absentia violated procedural Due Process of the Fourteenth Amendment of the U. S. Constitution (R. 9 & 36) (R. 37).

Sheriff of Cheyenne County, Nebraska made return to the Writ of Habeas Corpus (R. 40) and produced the body of this petitioner in Court, and thereafter on the same day on the Court's own Motion this petitioner was set at large (R. 10) and the Court ordered the "Order of Commitment" of the District Court of Morrill County, Nebraska was not a Warrant or order of Commitment (R. 10). The petitioner was set at large and freed.

On January 23, 1960 Plaintiff in Sidney, Cheyenne County, Nebraska was again placed under physical arrest by Respondents Norval Houston, Michael Linch and Leo Knudtson, upon direction of James L. Macken, County Attorney of Morrill County, Nebraska, under the Color of the "Order of Commitment" of the District Court of Morrill County, Nebraska of November 25th, 1960, and no warrant or valid commitment had ever been issued for the arrest or detention of this petitioner (R. 10).

That such action of the respondents was taken in disobedience of the Writ of Habeas Corpus of District Court of Cheyenne Conuty, Nebraska and done with the intent by respondents to deny this petitioner equal protection of law and to this petitioner, due process of law, and that

all of the defendants planned and agreed to commit all the acts alleged therein under the circumstance alleged (R. 10, 11).

That on January 23, 1960 this petitioner demanded a Warrant and was informed by respondent Houston that no Warrant was required (R. 11). That at said time petitioner demanded assistance of legal counsel and such demand was refused (R. 11).

That at time of petitioner's arrest and incarceration there was no valid judgment or sentence pronounced against him and that petitioner was not charged with a crime and that the District Court of Morrill County, Nebraska in a contempt proceeding was without jurisdiction to pronounce judgment of sentence to HARD LABOR in the Nebraska State Penitentiary for the reason that Contempt of Court was not a Crime in Nebraska (R. 11).

That petitioner was denied access to the courts of Cheyenne County, Nebraska by respondents and petitioner was forthwith physically removed from Cheyenne County, Nebraska, and Committed to *Hard Labor* in the Nebraska State Penitentiary, a distance of four hundred miles away (R. 11 & 12).

The "order of Commitment" of the Clerk of District Court of Morrill County, Nebraska was executed (R. 13).

That all actions taken by Judge Van Steenberg and James L. Macken on November 21, 1960 were done knowing they possessed no power, authority or jurisdiction to conduct trial in absentia and pass sentence imposing infamous punishment for contempt of court, not for a crime (R. 12).

That on January 23, 1961 the plaintiff was held captive in the Nebraska State Penitentiary by and at the direction of Respondents and was dressed in conspicuous dress and was then and thereafter shorn of his hair, and assigned Convict Number 21675, photographed, fingerprinted, confined and deprived of his liberty and his privilege of operator's license to operate a motor vehicle revoked, and deprived of his liberties, forced to HARD LABOR without pay, and subjected to hard fare, coarse and meager food and severe punishment (R. 13).

Respondents published on February 18th, 1961 petitioner's name in a Newpaper of General Circulation announcing therein that petitioner was being held in Nebraska State Penitentiary as a convict, subject to all rules and regulation of convicts (R. 13).

Petitioner was denied the privilege of receiving United States Mail (R. 13).

Petitioner was denied the assistance of Counsel and recording of interviews and inquiries of Boards of Review (R. 13).

Petitioner was held incommunicado (R. 13).

On or about April 4th, 1961 this petitioner was brought before the Nebraska State Penitentiary Disciplinary Board, denied the right to Counsel and the right to have the proceeding transcribed by a reporter, and was informed by the respondents, Maurice Sigler and John Greenholtz, that he was held under color of the Commitment sentence and that he was serving such sentence and therefore deprived of his civil rights (R. 13).

On May 12, 1961, the plaintiff was at the direction of the

respondents brought to hearing before the Nebraska State Penitentiary Disciplinary board. At such "hearing" he was denied assistance of counsel and was refused permission to have the proceedings transcribed by a reporter or a stenographer. At conclusion of such hearing the petitioner was sent to Dungeon and hole of Nebraska State Penitentiary and there restricted to solitary confinement; he was placed upon a diet of bread and water and vegetables without seasoning for a period of eight days; subjected to exposure of bright lights at all times; for only eight hours during each day was petitioner provided with a thin cotton pad and was deprived of all other bedding and comforts. Petitioner was subjected to solitary confinement from May 12, 1961 to August 21, 1961. During imprisonment petitioner was continually subjected to interrogation by the authorities, agents and servants of respondents (R. 41).

Petitioner was informed by respondents that petitioner was subject to right of diminution of sentence as provided in Nebraska Statute and that his sentence of conviction would be completely served and terminated on July 5, 1961, and on July 5, 1961 petitioner was refused discharge from the Nebraska State Penitentiary (R. 14).

At no time pertinent hereto was petitioner charged with the commission of any crime in connection with his arrest and detention (R. 15).

The complaint further sets forth the ways petitioner was damaged (R. 15).

Petitioner's second claim for damages sets forth Conspiracy of Respondents (R. 16).

Supplement to Complaint sets forth that on November

2, 1961, petitioner was again arrested by respondents in Douglas County, Omaha, Nebraska, denied access to the Courts of Douglas County, denied an attorney, *held incommunicado* in Douglas County Jail, and that the arresting officers held no warrant authorizing the arrest, and that the District Court of Morrill County, Nebraska in the Contempt proceeding did not order petitioner into custody of Sheriff of Morrill County, Nebraska after his discharge from Custody on August 21, 1961 and subsequent Discharge on Habeas Corpus on September 2, 1960 and January 16, 1961 (R. 21).

That notwithstanding, petitioner was while held incommunicado, again by respondents transported to the Nebraska State Penitentiary in Lancaster County, Nebraska and committed thereto by respondents as Convict No. 22107 to again serve the Void Sentence of the District Court of Morrill County, Nebraska of November 21, 1960 at Hard Labor for Contempt of Court in violation of the United States Constitution, Amendments 13 and 14, and that petitioner "was forced to serve said purported sentence a second time as Convict 22107" which plaintiff had been forced to serve as Convict No. 21675 (R. 21). That the sentence to hard labor violates and is a deprivation of rights guaranteed by the XIII and XIV amendments of the United States Constitution (R. 22).

That petitioner is required to perform Hard Labor (Involuntary Servitude) (R. 21).

The Third Claim of Petitioner's Complaint prays for injunctive relief (R. 17).

That at the time of Petitioner's arrest on January 23, 1961 the Courts of Cheyenne County and the Courts of Morrill County were open and available to respondents so they

could have made application for an arrest warrant.

The Opinion of the District Court (R. 68, 69, 70, 71) going beyond the face of the complaint in search of fact and the accepting of affidavits attached to the Motion to Dismiss to defeat the allegations of the complaint is a violation of due process of law, and said opinion was adopted by the United States Court of Appeals Eighth Circuit.

The District Court sustained 15 separate motions of defendants to dismiss (R. 42 to R. 53) and dismissed complaint.

REASON FOR GRANTING THE WRIT

1. The Eighth Circuit's construction of R. S #1979, (42 U. S. C. A. #1983) and the Fourteenth Amendment in this case squarely conflicts with the decision of this Court. *Monroe v. Pape*, 365 U. S. 167, 81 S. Ct. 473 (1961), said U. S. Supreme Court case squarely dealt with immunity of Law enforcement officers and holding that they are not immune to Federal Civil Rights Act, and damage action brought thereunder, complaint would have been sustained in the 7th Circuit under rule of *Monroe v. Pape*, supra.

2. The Eighth Circuit's construction of R. S. #1979 and Fourteenth Amendment in this case squarely conflicts with the decisions of the Fifth Circuit in *Davis v. Turner*, 197 F. 2d 847 (1952) and R. S. #1979 was cited by Fifth Circuit in that Opinion. The conflict is emphasized by the recent decision in *Jackson v. Duke*, 259 F. 2d 3 (Fifth Cir. 1958) and further emphasized by fifth Circuit decision *National Assn. for Advance of Colored People v. Gallion*, 290 F. 2d 337, 341, 190 F. Supp. 583 and reversed by United States Supreme Court October 23, 1961, 81 S. Ct. 4, holding the

complaint stated a cause of action and directing the court to proceed with trial on the issues. Further Fifth Circuit decision *Lewis v. Brautingam*, 227 F. 2d 123 (1955), holding County Attorneys, Prosecuting Officials and Law enforcement officers are not immune to Federal Civil Rights act. Petitioner's complaint would have been sustained in the Fifth Circuit.

The decision below also conflicts with the opinions of the Third Circuit in *Hague v. C. I. O.*, 101 F. 2d 774 at 781 (1939), and further Opinion of the Third Circuit *Pickling v. Pennsylvania R. Co.*, 151 F. 2d 240, reh. den., 152 F. 2d 753 (3d Cir. 1945) subsequent decision, 160 F. 2d 106 (3rd Cir. 1947), 332 U. S. 776 (1947) reh. den. 332 U. S. 821 (1947), holding that the privilege of judicial immunity was a rule of Common law, and "Congress possessed the Power to Wipe it Out." We think that the conclusion is irresistible that Congress by enacting the Civil Rights Act Sub Judice intended to abrogate the privilege to the extent indicated by that act and in fact did so. Section 1 of the third Civil Rights Act explicitly applied to "Any Person." R. S. Section 1979 applies to "Every Person." We can imagine no broader definition. The Statute must be deemed to include members of the state judiciary acting in official capacity." The Petitioner's complaint would have been sustained in the Third Circuit.

3. Only one Supreme Court case has ever dealt with the applicability of the Civil Rights Act to damage actions against Law Enforcement Officers, *Monroe v. Pape*, supra, and it reversed the Seventh Circuit decision, and remanded the case to the Seventh Circuit holding the law enforcement officers were not immune to the Federal Civil Rights Act. Consequently, the lower courts are in conflict and confusion and the confusion is further height-

ened by the recent decision, *Kostal v. Stoner*, 10 Cir., 292 F. 2d 492, certiorari denied 369 U. S. 868 (4/11/62), rehearing denied 370 U. S. 920 (6/11/62), and quoted by the Eighth circuit court opinion in the case at bar, and the scope and conflict and confusion as to the existence, scope and limits of the Federal Civil Rights remedy for unconstitutional police and Law enforcement action:

> "There is considerable doubt and confusion in the application of the Civil Rights Statutes throughout the Circuits."

Hoffman v. Halden, 268 F. 2d 280, 289 (9th Cir. 1959):

> "We shall not, in the present confused and confusing state of the law Attempt to mark out the general scope and sweep of the civil rights statutes * * *."
>
> *Deloach v. Rogers*, 268 F. 2d 928, 930 (5th Cir. 1959), quoting
>
> *McQuire v. Todd*, 198 F. 2d 60, 63 (5th Cir. 1952).

Appendix E. to this petition contains a chronological list of 39 reported civil cases filed under the Act in which police officers, constables, sheriffs, or sheriff's deputies, or prosecuting officials were parties defendant.

Appendix F. contains a list of eight such civil cases in which this Court has denied petition for a writ of certoriari.

Appendix G contains a list of 39 reported civil cases under the Act against police officials, law enforcement officials broken down by circuits, with a brief description of the facts and holding in each case.

4. No Supreme Court case has ever dealt with the applicability of the Civil Rights Act to damage actions against Clerks of Court acting without direction or order of the

Court.

5. No reported Supreme Court case has ever dealt with the applicability of the Civil Rights Act to action for damages and equitable relief against Judges of State Courts, acting in violation of U. S. Constitution and Federal Civil Rights Act, where because of *trial in absentia* there was a complete lack of jurisdiction.

6. The decisions below conflict with *Wolf v. Colorado*, 338 U. S. 25 (1949) and the very recent U. S. Supreme Court decision *Mapp v. Ohio*, 81 S. Ct. 1684 (1961).

The courts below held that petitioner had no remedy under the Civil Rights Act against Law Enforcement officials who committed, arrested petitioner three times without a Warrant or valid Commitment authorizing such arrest and twice committed petitioner to Involuntary Servitude in violation of the Fourth and Fourteenth Amendments of the United States Constitution, and ignoring Discharge and Writ of Habeas Corpus, the Court's opinion below (R. 58 to 83) rejected the claim these acts violated due process and equal protection of law rights under the Fourteenth Amendment and gave rise to proper cause of action under (R. S. # 1979).

But in *Wolf v. Colorado*, 338 U. S. 25, 27-28 (1949), this Court said:

> "The security of one's privacy against arbitrary intrusion by police * * * is * * * implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."

And in *Mapp v. Ohio*, 81 S. Ct. 1684 at p. 1694 this Court said:

> "Having once recognized that the right to privacy

embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure aganist true invasions of privacy by state officers is therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as to other basic rights secured by the Due Process Clause, we can no longer permit it to be revokable at the whim of any police officer, who, in the name of law enforcement itself, chooses to suspend its enjoyment."

7. Every search and seizure case which has reached this Court, except, *Monroe v. Pape*, supra, 365 U. S. 167 has involved a criminal, usually "caught red handed." *Draper v. United States*, 358 U. S. 307, 314 (1959). Justices have recognized that the Constitutional safeguard is associated in the public mind with the "dubious characters" who invoke it. *Harris v. United States*, 331 U. S. 145, 156 (1947).

This is only the second search and seizure case ever to come before this Court in which the rights of *innocent* person not charged with crime are in question. As such it presents novel issues of great importance and a significant occasion for the Court to expound the basic meaning of Constitutional rights to freedom from arbitrary invasion of personal liberty by law enforcement officials, and the commitment to *Involuntary Servitude* twice without the conviction of a Crime in violation of 13th Amendment U. S. Constitution, and the right of law enforcement officials without an order of the Court to ignore the Writ of Habeas Corpus and re-commit to involuntary servitude, after discharge and release therefrom by Writ of Habeas Corpus, and of Law enforcement officers to deny Petitioner Equal Protection of the Law, without any further order of the court, twice re-arrest and commit to imprisonment

and involuntary servitude on the same Commitment with no crime involved from which the discharge from custody on the writ of Habeas Corpus was obtained, Nebraska Statute R. R. S. Neb. 1943, 29-2809 found at Appendix D of this brief page 33.

8. No Supreme Court case has ever dealt with applicability of the Civil Rights Act to State Contempt of Court proceeding and the right of State Court in States like Nebraska where Contempt of Court is not a Crime to Commit to *HARD LABOR* in the State Penitentiary and the Nebraska Supreme Court has held that Contempt of Court is not a Crime in Nebraska, the Nebraska Supreme Court in *Smolczyk v. Gaston*, 147 Neb. 681, 24 N. W. 2d 362 said:

> "Under the holdings of this court contempt is not a crime though in the nature of a criminal proceeding. Butterfield v. State, 144 Neb. 388, 13 N. W. 2d 572. Imprisonment is not servitude, but labor enforced as punishment is involuntary servitude. Flanagan v. Jepson, 177 Iowa 393, 158 N. W. 641. In State v. West, 42 Minn. 147, 43 N. W. 845, it is said: 'There is nothing better settled than that enforced labor is "involuntary servitude" within the meaning of such constitutional provision.' And in Ex parte Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. Ed. 89, it is stated: 'Imprisonment at hard labor, compulsory and unpaid, is in the strongest sense of the words, involuntary servitude for crime; * * *.'
>
> "The defintion of involuntary servitude being thus established, it follows that the sentence imposing a jail term at hard labor for contempt of court is invalid as being in violation of cited constitutional provision. * * *"

The Thirteenth Amendment of the United States Constitution provides to-wit:

> "Neither Slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

And in the Iowa case of *Flanagan v. Jepson*, 177 Iowa 393, 158 N. W. 641 referred to by the Nebraska Court in the above cited case the Iowa Supreme Court said to-wit:

> "* * * And even if we go beyond the established rule in this state, and classify a prosecution for contempt as a criminal proceeding, it will still remain true that the petitioner in this case, though found guilty of contempt and subject to punishment therefor, has not thereby been convicted of crime, and therefore is not in such proceeding liable to IMPRISONMENT AT HARD LABOR IN THE PENITENTIARY." * **

and further quotes from the United States Supreme Court opinion of *Ex Parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89 to-wit:

> "For more than a century, imprisonment at hard labor in the penitentiary has been considered an infamous punishment in England and America."

The Iowa Court went on to say to-wit:

> "The authorities may be searched in vain for any precedent, under our constitutional form of government, holding it to be in the power of a state to clothe its courts with authority to visit infamous punishment upon any person for Contempt or in any proceeding whatever other than the orderly process of trial upon indictment or information. * * *"

The Iowa Court further said to-wit:

> "To recapitulate: a sentence to INFAMOUS PUN-

ISHMENT AT HARD LABOR can be lawfully imposed under our Constitution only as punishment for crime of which the accused has been duly convicted; one is not duly convicted of a crime except in a proceeding giving opportunity for a jury trial; a charge of contempt not being a charge of crime triable by jury, the court is without power or authority in such proceeding to penalize the contempt by imposing a sentence which is constitutionally restricted to cases of conviction for crime."

9. The Opinions of the Courts below (R. 66 to 70) in Construction of due process of law under the Fourteenth Amendment of the United States Constitution does not require confrontation of witnesses against accused in a state Contempt of Court proceeding and that the accused may be *tried in absentia* where there was notice of the hearing is in Direct Conflict with the Applicable decision of this Court in *In Re Oliver*, 333 U.S. 257, 275, 68 S. Ct. 499, 507, 508, 509, 510 in which this Court says to-wit:

> "We granted certiorari * * * to consider these procedural due process questions. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his own defense * * * a right to his day in court * * * are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine witnesses against him, to offer testimony, and to be represented by counsel. * * *
>
> "This court said that knowledge acquired from the testimony of others, or even from confession of the accused, would not justify conviction without a trial in which there was an opportunity for defense."
> "If some essential elements of the offense are not personally observed by the judge, so that he must depend upon the statements of others for his knowledge about these essential elements, due process requires * * * that the accused be accorded notice and a fair hearing as above set out. * * * *THE TERRY CASE AND OTHERS LIKE IT PROVIDE NO SUPPORT FOR SU-*

TAINING PETITIONER'S CONVICTION OF CONTEMPT OF COURT UPON TESTIMONY GIVEN IN PETITIONER'S ABSENCE. This case would be like the Terry case only if the judge there had not personally witnessed Terry's assault upon the Marshal but had nevertheless sent him to jail for contempt of court after hearing the testimony of witnesses against Terry in Terry's absence. * * * 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405 Ex Parte Terry.

"* * * due process has not demoralized the authority of courts. The reported cases reveal no instances * * * on the basis of testimony * * *, having been convicted of contempt, without notice of the specific charges against them, and opportunity to prepare a defense, to obtain counsel, to *cross examine* the witnesses against them, and to offer evidence in their own defense. The right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of 'demoralization of the court's authority.'

"It is 'the Law of the Land' that no man's life, liberty or property be forfeited as punishment until there has been a charge fairly made and fairly tried in a public tribunal. See Chamber v. Florida, 309 U. S. 227, 236, 237, 60 S. Ct. 472, 477, 84 L. Ed. 716. The petitioner was convicted without this kind of a trial. * * * Reversed and Remanded."

Concurring opinion of Justice Rutledge, P. 510 S. Ct.:

"This aggregated authority denies to the accused not only the right to public trial, but also those other basic protections secured by the Sixth Amendment, namely the rights 'to be informed of the nature of the cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.' * * * 'They cannot stand the test of constitutionality for the purpose of depriving any person of life, liberty or

property."

The opinion of the Courts below in the case at Bar holding that confrontation of the witness is not necessary is in direct conflict with the very recent decision of this Court in *In Re Green II* Petition on May 21, 1962, 82 S. Ct. 1114 holding that in a state Criminal Contempt proceeding the state Court must apply Procedural Due Process under the 14th Amendment of the U. S. Constitution, the same as that in a Criminal prosecution, which would require confrontation of witnesses, and would not allow trial in Absentia, and cites as authority *In Re Oliver*, above, and the *Oliver* case cites *Chambers v. Florida*, a First Degree murder case as to what constitutes Procedural Due Process, and this Court should grant the Writ in the case at bar to consider this vital civil right of Confrontation of the witnesses against the accused in a State Court Criminal Contempt proceeding.

This Court has held in many types of cases that the right to confrontation of witnesses is too valuable a United States Constitutional Right to be allowed to be eroded away by *Trial in Absentia*, *Green v. McElroy*, 79 S. Ct. 1400, p. 1413, to-wit:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that the same is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protec-

tions in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accussed shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * In re Oliver, 333 U. S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed. 682, but also in all types of cases where administrative and regulatory action were under scrutiny. * * * Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation."

"When Festus more than two thousand years ago reported to King Agippa that Felix had given him a prisoner named Paul and that Priesta and elders desired to have judgment against Paul, Festus is reported to have stated: 'It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him.' Acts 25:16."

"Professor Wigmore explains in some detail the emergence of the principle in Anglo-American law that confrontation and cross-examination are basic ingredients in a fair trial. 5 Wigmore on Evidence (3rd ed. 1940) ==1364. And see O'Brian, National Security and Individual Freedom, 62."

"Professor Wigmore commenting on the importance of cross examination in his treatise, 5 Wigmore on Evidence (3rd ed. 1940) ==1367:

"For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been

probed and sublimated by the test, has found increasing strength in lengthening experience."

It will be noted that *In Re Green II*, Supra, cites as authority for procedural due process *In Re Oliver*, Supra, and that *In Re Oliver* cites for the law as to procedural process *Chambers v. Florida*, 309 U. S. 227, 236, 60 S. Ct. 472, 477, 84 L. Ed. 716, which is a Florida State Court criminal case in first degree murder, and thereby making the same constitutional guarantees of procedural due process apply to state court contempt cases as apply to state court criminal cases and in *Chambers v. Florida*, Supra, the court said to-wit:

"The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and in the wrongs which called it into being, the due process provisions of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrranical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious or racial minorities and those who differed, who would not conform and who resisted tyranny. The instruments of such governments were, in the main, two. Conduct, innocent when engaged in, was subsequently made by fiat criminally punishable without legislation. And a liberty loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by 'the law of the land' forbidden when done. But even more was needed. From the popular hatred and abhorrence of illegal confinement, torture and extortion of confession of violations of the 'law of the land'

evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power. Thus, as assurance against ancient evils, our country in order to preserve, 'the blessing of liberty,' wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed."

"The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. * * * And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant and numerically weak and friendless, and powerless." * * *

"This requirement—of conforming to fundamental standards of procedure in criminal trials—was made operative against the States by the Fourteenth Amendment." * * *

"We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Un-

der our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, out numbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuation."

10. The opinion of the Eighth Circuit and the District Court below in case at bar Record 67 to 70 holding that District Court on Motion to Dismiss may consider Affidavits attached to respondent's motions to dismiss and that the District Court may travel outside the Record and outside the court in an effort to defeat the allegations of Petitioner's complaint is in direct conflict with the applicable decisions of this court, the leading decision being *Polk Co. v. Glover*, 305 U. S. 5, 59 S. Ct. 15, p. 17, to-wit:

> "Defendants' motion to dismiss like the demurrer for which it is a substitute (Equity Rule 29, U. S. C. A. following section 723) was addressed to the sufficiency of the allegations of the bill. For the purpose of that motion, the facts set forth in the bill stood admitted. For the purpose of that motion, the court was confined to the bill and was not at liberty to consider the affidavits or other evidence produced upon application for interlocutory injunction."

All Circuit Courts except the Eighth in the case at Bar have sustained the holding of *Polk v. Glover*, supra, as was done by the Seventh Circuit in considering *Monroe v. Pape*, 272 F. 2d 365 (1959), as did this Court in considering the same case 365 U. S. 167, 81 S. Ct. 473, when

considering R. S. §1979 (42 U. S. C. A. §1983) as did all other Circuit Courts of Appeal in all Civil Rights cases cited at Appendix E of this petition. Petitioner's complaint would have been accepted as true and sustained in all Circuits of the Circuit Courts except the Eighth. this emphasizes a conflict by recent decisions of Circuit Courts and in conflict with the rulings of this Court, which should be considered by this Court and clarified as to this conflict, and the rule should be established in the Eighth Circuit by review of this case that the Filing of Motion to Dismiss admits the allegations of the Complaint and that the Courts in the Eighth Circuit cannot go beyond the face of the Complaint in considering motion to dismiss the complaint and cannot travel outside the face of the complaint in an effort to find evidence to defeat the facts alleged in the complaint. That going beyond the face of the complaint to defeat the allegations of the complaint is a denial of Due Process of Law and gives petitioner no opportunity to test the truth of such evidence secured by the Court and denies petitioner confrontation of witnesses in such matter or to refute the same.

Davis v. Turner, 197 F. 2d 847 (5th Cir.)

"Motion to dismiss admits well pleaded facts contained in complaint."

11. The holding of the Court below that Law Enforcement officers are Immune to Judgment for damages and equitable relief (R. 76) is in direct conflict with the holdings of the Nebraska Supreme Court where the re-arrest is made on the same commitment after a discharge in Habeas Corpus, the Nebraska case referring to section 29-2809, R. R. S. Nebraska, 1943, found at Appendix D of this petition, P. 39 and reading in part as follows:

"* * * Any person who shall be set at large upon any habeas corpus, shall not be again imprisoned for the

same offense * * *."

Section 29-2809, R. R. S. Neb. 1943 was formerly section 361 of the Criminal code and as to the *Immunity* of Sheriff and law enforcement officers to this section in *Heir v. Hutchings*, 58 Neb. 335, 78 N. W. 638 the Nebraska Supreme Court said to-wit:

> "* * * The jury found specifically that constable Heir received notice, before taking Hutchings into his custody, that Hutchings had already been released on habeas corpus from the custody of an officer by whom he had been arrested upon a mittimus in the same case as that in which was issued the mittimus by virtue of which constable Heir arrested him and carried him to the County seat, a distance of about fifteen miles, and that said constable continued to hold Hutchings in custody after receiving the notice aforesaid. The section of the Criminal Code above referred to provides that in such case the party offending shall forfeit to the party aggrieved the sum of $500.00. The evidence fully sustained the findings of the jury, and it is not necessary that we should review the findings of the jury, and it is not necessary we should review it for the purpose of justifying this conclusion. In their nature these damages were general (Bank of Commerce v. Goos, 39 Neb. 437) and hence it was proper that the statute should liquidate them, as was done by the provisions of the cited section."

Thus the Courts below were in error as to their conclusion in the case at bar that Sheriffs are immune under Nebraska law when they violate section 29-2809, R. R. S. Neb. 1943, and the opinions of the Courts below in the case at bar are in conflict with the applicable decisions of the Nebraska Supreme Court, above set out.

12. No Supreme Court case has ever dealt with the applicability of Civil Rights Act to damage action where State Court in Habeas Corpus proceeding (R. 9 & R. 36)

has determined that the State Court and Judge was without jurisdiction where in contempt proceeding State Court conducted *Trial in Absentia* and called witnesses, introduced evidence; in absence of the accused, this petitioner; as to whether when said State Court was without jurisdiction because it did not have the body of the accused before it in body to be confronted by the witnesses, said determination is binding on the United States District Court in a Federal Civil Rights Action that the state court was without jurisdiction, and therefore whether all subsequent actions of law enforcement officials are without jurisdiction and therefore the law enforcement officials would have no immunity to the Federal Civil Rights Act, and a damage action brought thereon. As such, it presents novel issues of great importance and a significant occasion for the Court to expound the basic meaning of the Constitutional right to freedom from arbitrary police invasion of the right of personal liberty without further order of any court authorizing the same after the order setting him at large in Habeas Corpus (R. 10), and subsequent discharge from custody on said order.

CONCLUSION

There is a conflict between the Circuits. The lower courts are in confusion. The leading Supreme Court cases have been rejected or ignored below. The constitutional rights of an innocent person not charged with a crime have been outrageously violated.

For the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
PAUL E. RHODES
Pro Se
Howe, Nebraska

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,990

Paul E. Rhodes, Appellant, vs. Norval Houston, et al., Appellees.	Appeal from the United States District Court for the District of Nebraska

November 29, 1962

Before Sanborn and Blackman, Circuit Judges, and Register, District Judge.

Per Curiam.

This is an appeal from the order of the United States District Court for the District of Nebraska dismissing appellant's complaint. The exhaustive opinion of the trial court (Judge Van Pelt) published at 202 F. Supp. 624 contains a careful and detailed analysis of the essential facts. Judge Van Pelt's well considered conclusions, which we believe to be correct and with which we concur, are supported by a wealth of authority. On the basis of said opinion, the judgment of the trial court is affirmed. Also see: *Kostal v. Stoner*, 10 Cir., 292 F. 2d 492, certiorari denied 369 U. S. 809 (4/30/62), rehearing denied 370 U. S. 920 (6/11/62).

A true copy.

Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

Judgment of the Court of Appeals

United States Court of Appeals, Eighth Circuit, Judgment November 29, 1962. Rhodes v. Houston, No. 16990.

Judgment of this court in accordance with opinion of this court entered this day and appeal dismissed.

The Court

APPENDIX C

Opinion of the District Court

The opinion of the District Court is found in the printed Record of this case filed in the Court of Appeals, 9 copies furnished with the record at pages 58 to 83, and is reported 202 F. Supp. 624 (1962).

APPENDIX D

Additional Statutes Involved

R. S. § 1979 (42 U. S. C. A. § 1983):

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U. S. C. § 1343 (28 U. S. C. A. § 1343):

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

28 U. S. C. (1958 ed.) § 1331 (28 U. S. C. A. § 1331):

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

42 U. S. C. A. #1985 (2):

"Two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating in any manner, the due course of justice in any state or territory, with intent to deny citizens the equal protection of laws or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws."

42 U. S. C. A. #1985 (3):

"In any cause of conspiracy set forth in this section, if any one or more persons engaged therein do, or cause to be done, any act in the furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for recovery of damages occasioned by such injury or deprivation against any one or more of the conspirators."

Title 42 U. S. C. A., Sec. 1986, provides:

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrong act be committed, shall be liable to the party injured, or his legal representative, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action. * * *"

Amendment 14, Constitution of the United States:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Amendment 4, United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment 5, United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 6, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment 8, United States Constitution:

"Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment 13, United States Constitution:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. 'Congress shall have power to enforce this article by appropriate legislation."

Also involved are the following sections of the Nebraska Statutes, R. R. S. Nebraska 1943:

"29-102. 'Felony' and 'misdemeanor,' defined. The term 'felony' signifies such an offense as may be punished with death or imprisonment in the penitentiary. Any other offense is denominated a 'misdemeanor.'"

"29-2001. Trial; felony, misdemeanor; presence of accused required; exceptions. No person indicted for a felony shall be tried unless personally present during the trial. Persons indicted for a misdemeanor may, at their own request, by leave of the court be put on trial in their absence. The request shall be in writing and entered on the journal of the court."

"29-2201. Verdict of 'guilty'; accused to be notified before sentence. Before the sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, and asked whether he has anything to say why judgment should not be passed against him."

"29-2303. Writ of error; felony cases; procedure; escape of convict; warrant issued. Whenever a person shall be convicted of a felony, and the judgment shall be suspended as aforesaid, it shall be the duty of the court to order the person so convicted into the custody of the sheriff, to be imprisoned until the case in error be disposed of, or such person admitted to bail. If a person so convicted shall escape, the jailer or other officer from whose custody the escape was made may return to the clerk of the proper court the writ by virtue of which the convict was held in custody, with information of the escape endorsed thereon, whereupon the clerk shall issue a warrant stating such conviction, and commanding the sheriff of the county to pursue such person into any county in the state; and the sheriff shall take such person and com-

mit him to the jail of the county."

"29-2401. Execution of sentences; conviction of felony; delivery of prisoner to penitentiary. Every person sentenced to the penitentiary shall, within thirty days, and as early as practicable after his sentence, unless the execution thereof be suspended, be conveyed to the penitentiary of this state by the sheriff of the county in which the conviction took place, and shall there be delivered into the custody of the warden of the penitentiary, together with a copy of the sentence of the court ordering such imprisonment, there to be safely kept until the term of his confinement shall have expired, or he shall be pardoned. If the execution of the sentence be suspended and the judgment is afterward affirmed, the defendant shall be conveyed to the penitentiary within thirty days after the court shall direct the sentence to be executed."

"29-2801. Habeas corpus; writ; when allowed. If any person, except persons convicted of some crime or offense for which they stand committed, or persons committed for treason or felony, the punishment whereof is capital, plainly and specially expressed in the warrant of commitment, now is or shall be confined in any jail of this state, or shall be unlawfully deprived of his or her liberty, and shall make application, either by him or herself or by any person on his or her behalf, to any one of the judges of the district court, or to any county judge, and does at the same time produce to such judge a copy of the commitment or cause of detention of such person, or if the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a writ of habeas corpus, which writ shall be issued forthwith by the clerk of the district court, or by the county judge, as the case may require, under the seal of the court whereof the person allowing such writ is a judge, directed to the proper officer, person or persons who detains such prisoner."

"29-2805. Hearing by court or judge; procedure. On the hearing of any habeas corpus issued as aforesaid, it shall be the duty of the judge or court who shall hear the same to examine the witness or witnesses aforesaid, and such other witnesses as the prisoner may request, touching any offense mentioned in the warrant of commitment, whether the offense be technically set out in the commitment or not. Upon the hearing the judge or court may either recommit, bail or discharge the prisoner, according to the facts of the case."

"29-2806. Disposition of cause. When the judge shall have examined into the cause of the caption and detention of the person so brought before him, and shall be satisfied that the person is unlawfully imprisoned or detained, he shall forthwith discharge such prisoner from confinement. In case the person or persons applying for such writ shall be confined or detained in a legal manner, on a charge of having committed any crime or offense, the judge shall, at his discretion, commit, discharge or let to bail such person or persons, and if the judge shall deem the offense bailable, on the principles of law, he shall cause the person charged as aforesaid to enter into recognizance, with one or more sufficient securities, in such sum as the judge shall think reasonable, the circumstances of the prisoner and the nature of the offense charged considered, conditioned for his appearance at the next court where the offense is cognizable. The judge shall certify his proceedings, together with the recognizance, forthwith, to the proper court; and if the person or persons charged as aforesaid shall fail to enter into such recognizance he or they shall be committed to prison by such judge."

"29-2809. Applicant discharged; rearrest for same offense prohibited; penalty; exceptions. Any person who shall be set at large upon any habeas corpus, shall not be again imprisoned for the same offense, unless by the legal order or process of the court wherein he or she shall be bound by recognizance to appear, or

other court having jurisdiction of the cause or offense. If any person shall knowingly, contrary to sections 29-2801 to 29-2824, recommit or imprison, or cause to be recommitted or imprisoned for the same offense or pretended offense, any person so set at large, or shall knowingly aid or assist therein, he shall forfeit to the party aggrieved five hundred dollars, any colorable pretense or variation in the warrant or commitment notwithstanding."

APPENDIX E

Chronological List of 37 Reported Civil Suits Against Police Officers Under Civil Rights Act

Hague v. C.I.O., 307 U. S. 496 (1939), Modifying and aff'g 101 F. 2d 774 (3d Cir. 1939) and 25 F. Supp. 127 (D.N.J. 1938).

Gladstone v. Galton, 145 F. 2d 742 (9th Cir. 1944).

Picking v. Pennsylvania R. Co., 151 F. 2d 240 (3d Cir. 1945); reh. den., 152 F. 2d 753 (1945); subsequent decision, 160 F. 2d 106 (1947); cert. den., 332 U. S. 776 (1947); reh. den., 332 U. S. 821 (1947).

Refoule v. Ellis, 74 F. Supp. 336 (N.D. Ga. 1947).

McShane v. Moldovan, 172 F. 2d 1016 (6th Cir. 1949); subsequent decisions, 181 F. 2d 189 (1950).

Valle v. Stengel, 176 F. 2d 697 (3d Cir. 1949); rev'g 75 F. Supp. 543 (D.N.J. 1948).

Watkins v. Oak Lawn Jockey Club, 86 F. Supp. 1006 (W.D. Ark. 1949); aff'd 183 F. 2d 440 (8th Cir. 1950).

Robeson v. Fanelli, 94 F. Supp. 62 (S.D.N.Y. 1950); prior opinion, 91 F. Supp. 251 (1950).

Erickson v. Hogan, 94 F. Supp. 459 (S.D.N.Y. 1950).

Stefanelli v. Minard, 342 U. S. 117 (1951); Aff'g 184 F. 2d 575 (3d Cir. 1950).

McGuire v. Amrein, 101 F. Supp. 414 (D. Md. 1951).

Davis v. Turner, 197 F. 2d 847 (5th Cir. 1952).

State of Arkansas v. Central Surety Corp., 102 F. Supp.

444 (W.D. Ark. 1952).

Yglesias v. Gulfstream Park Racing Ass'n, 201 F. 2d 817 (5th Cir. 1953); cert. den. 345 U. S. 993 (1953).

Mueller v. Powell, 203 F. 2d 797 (8th Cir. 1953); aff'g 105 F. Supp. 344 (W.D. Mo. 1952).

Geach v. Moynahan, 207 F. 2d 714 (7th Cir. 1953).

Jennings v. Nester, 217 F. 2d 153 (7th Cir. 1954); cert. den. 349 U. S. 958 (1955).

Dye v. Cox, 125 F. Supp. 714 (E.D. Va. 1954).

Dineen v. Williams, 219 F. 2d 428 (9th Cir. 1955).

Lewis v. Brautigam, 227 F. 2d 124 (5th Cir. 1955).

McCollum v. Mayfield, 130 F. Supp. 112 (N.D. Calif. 1955).

Thompson v. Baker, 133 F. Supp. 247 (W.D. Ark. 1955).

Davis v. Johnson, 138 F. Supp. 572 (N.D. Ill. 1955).

Agnew v. City of Compton, 239 F. 2d 226 (9th Cir. 1956); cert. den. 353 U.S. 959 (1957).

Pollack v. Newark, 147 F. Supp. 35 (D. N.J. 1956); aff'd, 248 F. 2d 543 (3d Cir. 1957); cert. den., 355 U.S. 964 (1958).

Mackey v. Chandler, 152 F. Supp. 579 (W.D. S.C. 1957).

Coleman v. Johnson, 247 F. 2d 273 (7th Cir. 1957).

Simmons v. Whitaker, 252 F. 2d 224 (5th Cir. 1958).

Wakat v. Harlib, 253 F. 2d 58 (7th Cir. 1958).

Curry v. Ragan, 257 F. 2d 449 (5th Cir. 1958); cert. den., 358 U.S. 851 (1958); reh. den., 358 U.S. 914 (1958).

Hampton v. DeBlaay, 258 F. 2d 790 (6th Cir. 1958); cert. den. 358 U.S. 850 (1958); reh. den. 359 U.S. 922 (1959).

Jackson v. Duke, 259 F. 2d 3 (5th Cir. 1958).

Watson v. Devlin, 167 F. Supp. 638 (E.D. Mich. 1958); aff'd 268 F. 2d 211 (6th Cir. 1959).

Stift v. Lynch, 267 F. 2d 237 (7th Cir. 1959).

Deloach v. Rogers, 268 F. 2d 928 (5th Cir. 1959).

Haifetz v. Rizzo, 171 F. Supp. 654 (E.D. Pa. 1959).

Egan v. Aurora, 174 F. Supp. 794 (N.D. Ill. 1959).

Monroe v. Pape, 367 U.S. 167, 81 S. Ct. 473 (1961).

Kostal v. Stoner, 292 F. 2d 492, 10 Cir. (1962).

APPENDIX F

Civil Cases Under the Civil Rights Act Against Police Officers and Law Enforcement Officers in Which Certiorari Has Been Denied

Opinion Below	*Certiorari Denied*
Hampton v. DeBlaay, 258 F. 2d 790 (6th Cir. 1958).	358 U. S. 850 (1958) *reh. den.* 359 U. S. 922 (1959).
Curry v. Ragan, 257 F. 2d 449 (5th Cir. 1958).	358 U.S. 851 (1958) *reh. den.* 358 U.S. 914 (1958).
Pollack v. Newark, 147 F. Supp. 35 (D.N.J. 1956) aff'd, 248 F. 2d 543 (3d Cir. 1957).	355 U.S. 964 (1958).
Agnew v. City of Compton, 239 F. 2d 226 (9th Cir. 1956).	353 U.S. 959 (1957).
Jennings v. Nester, 217 F. 2d 153 (7th Cir. 1954).	349 U.S. 958 (1955).
Yglesias v. Gulfstream Park Racing Ass'n., 201 F. 2d 817 (7th Cir. 1953).	345 U.S. 993 (1953).
Picking v. Pennsylvania R. Co., 151 F. 2d 240, *reh. den.*, 152 F. 2d 753 (3d Cir. 1945) *subsequent decision*, 160 F. 2d 106 (3d Cir. 1947).	332 U.S. 776 (1947) *reh. den.* 332 U.S. 821 (1947).

APPENDIX G

Reported Civil Cases Under the Civil Rights Act Against Police Officers and Law Enforcement Officers with Description of Facts and Holdings by Circuits

SUPREME COURT

1.	
Hague v. C. I. O., 307 U.S. 496 (1939) modifiying and aff'g 101 F. 2d 774 (3d Cir. 1939) and 25 F. Supp 127 (D.N.J. 1938)	Suit to enjoin, *inter alia*, arrests, confiscation of pamphlets and ejection of individuals from city, committed by local police, acting under unconstitutional ordinance, for purpose of depriving plaintiffs of speech and assembly rights. Injunction issued.
2.	
Stefanelli v. Minard, 342 U.S. 117 (1951) aff'g 184 F. 2d 575 (3d Cir. 1950)	Suit to enjoin use in State criminal proceeding of evidence illegally seized by local police. Relief denied in exercise of "equitable discretion."

FIRST CIRCUIT

(No cases.)

SECOND CIRCUIT

3.	
Erickson v. Hogan, 94 F. Supp. 459 (S.D.N.Y. 1950)	Suit to enjoin use in State criminal proceeding of evidence illegally seized by local police. Relief denied. *Dictum* that damage action can be maintained, and leave granted to amend complaint accordingly.

4. *Robeson v. Fanelli*, 94 F. Supp. 62 (S.D.N.Y. 1950) prior opinion, 91 F. Supp. 251 (1950)	Damage complaint alleging, *inter alia*, conspiracy, assaults, and failure to prevent rioting at public political meeting. Complaint upheld.

THIRD CIRCUIT

5. *Picking v. Pennsylvania R. Co.*, 151 F. 2d 240 (1945) *reh. den.*, 152 F. 2d 753 (1945) subsequent decision, 160 F. 2d 106 (1947) *cert. den.*, 332 U.S. 776 (1947) *reh. den.*, 332 U.S. 821 (1947)	Damage complaint alleging *inter alia*, false arrest, imprisonment and physical mistreatment, *semble.*, See 151 F. 2d at 249. Complaint upheld. Plaintiffs appeared *pro se*, further holding that passage of Federal Civil right act congress intended and did Sub Judice wipe out Judicial immunity, applies the act to every person and includes members of the state judiciary acting in official capacity.
6. *Valle v. Stengel*, 176 F. 2d 697 (1947) *rev'g* 75 F. Supp. 543 (D.N.J. 1948)	Complaint for damages and injunction, alleging *inter alia*, false arrest by police chief in aid of private swimming pool's illegal (under state law) segregation policy. Complaint upheld.
7. *Pollack v. Newark*, 147 F. Supp. 35 (D.N.J. 1956) *aff'd*, 248 F. 2d 543 (3d Cir. 1957) *cert. den.*, 355 U.S. 964 (1958)	Suit for damages alleging plaintiff's arbitrary arrest by police. Complaint and affidavit of plaintiff (who appeared *pro se*) fail to make out, even *prima facie*, a false arrest. Summary

	judgment for defendant. Court assumes that arrest without probable cause gives action under Act.
8. *Haifetz v. Rizzo*, 171 F. Supp. 654 (E.D. Pa. 1959)	Suit to enjoin "mass raids" on coffee shop and for damages ensuing arbitrary arrests. Preliminary injunction. Decision on "serious and substantial questions" raised by action, deferred to hearing on merits.

FOURTH CIRCUIT

9. *Dye v. Cox*, 125 F. Supp. 714 (E.D. Va. 1954)	Damage complaint alleging false arrest, overnight secret detention plus beating. On motion to dismiss, *held* that no cause of action stated because plaintiff failed to allege specific intent to deprive him of his constitutional rights. Leave given plaintiff to amend his complaint accordingly.
10. *Mackey v. Chandler*, 152 F. Supp. 579 (W.D.S.C. 1957)	Damage action alleging unreasonable search and seizure, secret detention and brutality. Jury verdict for plaintiffs. Judgment *n.o.v.* for defendants on grounds that allegations and proof fail to make out a federal cause of action.
11. *McGuire v. Amrein*, 101 F. Supp. 414 (D. Md. 1951)	Suit to enjoin use in state criminal proceeding of wiretap evidence obtained by

local police. Relief denied in exercise of "equitable discretion." Alternatively, no cause of action pleaded because no *constitutional* violation alleged, citing *Olmstead v. U. S.*, 277 U.S. 438 (1928).

FIFTH CIRCUIT

12.

Davis v. Turner, 197 F. 2d 847 (1952)

Damage action alleging unreasonable search and seizure, battery and secret detention. Complaint upheld.

13.

Yglesias v. Gulfstream Park Racing Ass'n, 201 F. 2d 817 (1953) *cert. den.* 345 U.S. 993 (1953)

Damage action alleging false imprisonment followed by improper trial on criminal charges. Complaint dismissed.

14.

Lewis v. Brautigan, 227 F. 2d 124 (1955)

Damage complaint alleging, *inter alia*, coercion of confession by psychological pressures, threats and intimidation. Complaint upheld. Further held prosecuting Attorney liable and not immune.

15.

Simmons v. Whitaker, 252 F. 2d 224 (1958)

Damage complaint alleging threats by sheriff to arrest plaintiff in the course of sheriff's successful effort to force plaintiff to pay large hospital bills although she was not liable for them. Directed verdict for sheriff affirmed. No proof sheriff acted under color of law.

	No proof sheriff acted with specific intent to deny constitutional rights.
16. *Jackson v. Duke*, 259 F. 2d 3 (1958)	Damage action based on brutal beating and false arrest. Judgment on jury verdict of $5,000.00 affirmed.
17. *Curry v. Ragan*, 257 F. 2d 449 (1958) *cert. den.*, 358 U.S. 851 (1958) *reh. den.*, 358 U.S. 914 (1958)	Damage complaint, filed by layman, *pro se* alleging malicious institution of forcible entry and detainer action by private citizen. Three defendant policemen acting pursuant to court order, assisted in ejecting plaintiff from his home. Complaint dismissed.
18. *Deloach v. Rogers*, 268 F. 2d 928 (1959)	Damage complaint alleging false arrest and beating by officers acting pursuant to "peace warrant." Complaint dismissed.
19. *Refoule v. Ellis*, 74 F. Supp. 336 (N.D. Ga. 1947)	Suit to enjoin repeated false arrests followed by secret police interrogations of plaintiff. Injunction issued.
20. *National Association for Advance of Colored People v. Gallion*, 290 F. 2d 337, 341 and 190 F. Supp. 583; reversed by U. S. Supreme Court Oct. 23, 1961, 82 S. Ct. 4.	Action against Attorney General of Alabama. U. S. Dist. Court, U. S. Fifth Circuit of Appeals held Attorney General immune. United States Supreme Court reversed and remanded, directed U. S. Dist. Court to proceed with trial for reason state attorney general

	is not immune to action brought under Federal Civil Rights Act.

SIXTH CIRCUIT

21.	
McShane v. Moldovan, 172 F. 2d 1016 (1949) *subsequent decision*, 181 F. 2d 189 (1950)	Damage complaint alleging false imprisonment and conspiracy to "frame" plaintiff on a state criminal charge. Complaint upheld.
22.	
Watson v. Devlin, 167 F. Supp. 638 (E.D. Mich. 1958) *aff'd* 269 F. 2d 211 (1959)	Damage complaint alleging long secret detention plus "malicious prosecution" and "false arrest," filed by state convict, *pro se*. Held, complaint frivolous, leave to proceed in *forma pauperis* denied.
23.	
Hampton v. DeBlaay, 258 F. 2d 790 (1958) *cert. den.*, 358 U.S. 850 (1958) *reh. den.*, 359 U.S. 922 (1959)	Damage complaint alleging false arrest and imprisonment, filed by convict, *pro se*. Summary judgment for defendants affirmed. Plaintiff's admissions in prior State Court proceedings negate existence of any cause of action or issue of fact.

SEVENTH CIRCUIT

24.	
Geach v. Moynahan, 207 F. 2d 714 (1953)	Damage complaint alleging unreasonable search, secret detention, beating to obtain confession filed by convict, *pro se*. Complaint upheld.
25.	
Jennings v. Nester, 217 F. 2d 153 (1954) *cert. den.*	Damage complaint alleging unreasonable search, secret

349 U.S. 958 (1955).	detention; beating to obtain confession filed by convict, *pro se*. Complaint dismissed.
26. *Coleman v. Johnson*, 247 F. 2d 273 (1957)	Damage complaint alleging three day secret detention of prisoner suffering from bullet wounds, refusal to furnish medical care, malicious prosecution. Complaint upheld.
27. *Wakat v. Harlib*, 253 F. 2d 59 (1958)	Damage action based on six day secret detention, beating to obtain confession of plaintiff, a "well known criminal," and conspiracy to accomplish these ends. Judgment on jury verdict of $15,000.00 affirmed.
28. *Stift v. Lynch*, 267 F. 2d 237 (1959)	Damage complaint alleging false arrest and two hour (p. 238 n. 1) secret detention. Complaint dismissed.
29. *Davis v. Johnson*, 138 F. Supp. 572 (N.D. Ill. 1955)	Damage complaint alleging battery with a pistol followed by fatal shooting. Complaint upheld.
30. *Egan v. Aurora*, 174 F. Supp. 794 (N.D. Ill. 1959)	Damage complaint alleging false arrest of political speaker. Complaint dismissed.
31. *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473	Complaint held sufficient against motion to dismiss against law enforcement officers.

EIGHTH CIRCUIT

32. *Mueller v. Powell*, 203 F. 2d 797 (1953) *aff'd* 105 F. Supp. 344 (D.D. Mo. 1952)	Damage action based on alleged false arrest and all night secret detention for interrogation. Judgment on merits for defendants after bench trial, affirmed. Defendants had "probable cause" to arrest and question plaintiff.
33. *State of Arkansas v. Central Surety Corp.*, 102 F. Supp. 444 (W.D. Ark. 1952)	Damage complaint alleging false arrest and repeated batteries. Complaint upheld, summary judgment for defendants denied.
34. *Thompson v. Baker*, 133 F. Supp. 247 (W.D. Ark. 1955)	Action for injunction, declaratory judgment and damages alleging improper (under state law) issuance and service of garnishment writs. Complaint dismissed.
35. *Watkins v. Oak Lawn Jockey Club*, 86 F. Supp. 1006 (W.D. Ark. 1949) *aff'd* 183 F. 2d 440 (1950)	Damage action based on false arrest by deputy sheriff, employed part-time by race track. Held, (after trial on merits followed by "hung" jury)—Directed verdict for defendants.

NINTH CIRCUIT

36. *Gladstone v. Galton*, 145 F. 2d 742 (1944)	Complaint for damages and injunction, alleging arrests, searches and prosecutions of plaintiff pursuant to allegedly unconstitutional ordinance. Complaint dismissed.

	Ordinance is constitutional.
37. *Dineen v. Williams*, 219 F. 2d 428 (1955)	Damage complaint alleging false arrest and 20 hour secret detention. Complaint dismissed.
38. *Agnew v. City of Compton*, 239 F. 2d 226 (1956) *cert. den.* 353 U.S. 959 (1957)	Damage complaint alleging false arrest. Complaint dismissed.
39. *McCollum v. Mayfield*, 130 F. Supp. 112 (N.D. Cal. 1955)	Damage complaint alleging that plaintiff, jailed pending criminal trial, was forced to do menial labor, suffered injuries in the course of such labor, and was denied medical care. Complaint upheld.

TENTH CIRCUIT

(No cases.)

DISTRICT OF COLUMBIA CIRCUIT

(No cases.)

Office-Supreme Court, U.S.
FILED
JAN 26 1983
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

No. 675

PAUL E. RHODES, PETITIONER

V.

NORVAL HOUSTON, et al., RESPONDENTS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CLARENCE A. H. MEYER
Attorney General, State of Nebraska
State Capitol Building
Lincoln, Nebraska
ROBERT A. NELSON
Special Assistant Attorney General
State of Nebraska
P. O. Box 2028
605 South 14th Street
Lincoln, Nebraska
Attorneys for Respondents

JOE CHRISTENSEN PRINTING, 1521 O Street, Lincoln 8, Nebr.

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In The

Supreme Court of the United States

No. 675

PAUL E. RHODES, PETITIONER

V.

NORVAL HOUSTON, et al., RESPONDENTS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CLARENCE A. H. MEYER
Attorney General, State of Nebraska
State Capitol Building
Lincoln, Nebraska
ROBERT A. NELSON
Special Assistant Attorney General
State of Nebraska
P. O. Box 2028
605 South 14th Street
Lincoln, Nebraska
Attorneys for Respondents

QUESTIONS PRESENTED FOR REVIEW

1. Does a complaint, in a Civil Rights Action, which does not set forth any substantial facts estab-

lishing federal jurisdiction but merely asserts conclusions of violation of constitutional rights, state a claim upon which relief can be granted?

2. Has the doctrine of Judicial Immunity been abrogated by the Civil Rights Act?

3. Is a defendant in a contempt of court proceeding deprived of any rights guaranteed by the Constitution of the United States where he voluntarily absents himself during a portion of the trial, and during imposition of sentence?

4. Does a judgment sentencing a defendant to serve a term in a state penitentiary for contempt of court violate any rights guaranteed by the Constitution of the United States?

5. Can a judgment in a habeas corpus action be considered as res judicata as to matters not considered by the Court issuing the Writ?

STATEMENT OF THE CASE

This cause is before this Court on the Petition of Paul E. Rhodes for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. The action was commenced in the United States District Court for the District of Nebraska by the petitioner as plaintiff, who sought to recover damages from the defendants under the Federal Civil Rights Act. The defendants were a number of Nebraska judicial and law enforcement officers (including all of the members of the Supreme Court of Nebraska), a North Platte, Nebraska, law firm, and the bonding companies of a number of defendants.

Motions to dismiss were filed on behalf of all of

the defendants, and after hearing and submission of briefs, the District Court sustained all of the motions to dismiss and entered an order dismissing the Complaint as to all of the defendants. The opinion of Judge Van Pelt is published in 202 Fed. Supp. 624.

Petitioner then prosecuted an appeal to the United States Court of Appeals for the Eighth Circuit, except as to that part of the order dismissing the action against the North Platte law firm.

The Circuit Court affirmed by a per curiam opinion, entered on November 29, 1962, which opinion adopted in its entirety the opinion of the District Court. — Fed. 2d —.

ARGUMENT

Preface

The Complaint of Petitioner has its origin in an action brought by Clarence S. Beck, then Attorney General of Nebraska, in the District Court of Morrill County, Nebraska, entitled State of Nebraska vs. Paul E. Rhodes, Case No. 4819. By Information filed therein on July 19, 1960, Petitioner, an attorney at law, practicing at Bridgeport, Nebraska was charged with contempt of the said District Court of Morrill County. The record discloses that thereafter proceedings were had in this matter on August 1, 1960, and on September 6 and 7, 1960 (R 30). Petioner appeared in these proceedings in person and by his attorney, George. D. McArthur, of Hastings, Nebraska. The State had rested its case at the conclusion of the hearing on September 7, but later counsel for the State notified both petitioner and his attorney that it desired to apply to the Court to with-

draw the rest and introduce further evidence (Supp. R 7). Thereafter the matter was set for further proceedings on several different dates, but continued at the request of the Petitioner (Supp. R 2-7).

On October 31, 1960, the Court entered an order continuing the matter to November 21, 1960, at 10:00 o'clock a.m. (Supp. R 14). Notice of this hearing was served upon Petitioner on November 15, 1960 (Supp. R 15). This notice further stated: "You are further notified that in the event the court should overrule a further motion for continuance on your part, the State will ask the court to proceed to complete the trial notwithstanding your absence." On the day set for hearing Petitioner filed another motion for continuance, supported by an affidavit of J. R. Arneill, M. D., copies of which were mailed to James L. Macken, the prosecuting attorney, the same day (Supp. R. 16-18). At the time fixed for hearing, the court permitted the State to make its showing in resistance to Petitioner's motion for continuance. This showing included the testimony of several witnesses which disclosed the activities of Petitioner for some four weeks prior to November 21, 1960, and including November 19, 1960 (Supp. R 25-57).

The Court then found that the evidence showed considerable physical activity on the part of the petitioner wholly inconsistent with his claim of physical inability to stand trial. The motion for continuance was overruled and the case proceeded with the further introduction of evidence by the State (R 7).

Judgment was then entered by the Court finding Petitioner guilty of contempt as charged and sen-

tencing him to confinement in the Nebraska State Penitentiary for a period of nine months at hard labor and imposing a fine of $2,500.00 (R 7). On November 25, 1960, Virginia A. Schuetz, Clerk of the District Court of Morrill County, issued an "Order of Commitment" upon said judgment.

The Complaint sets forth the overruling of petitioner's motion for continuance, proceeding with the trial in his absence, the sentence to the State Penitentiary, and Petitioner's subsequent arrest and incarceration, as being a deprivation of his civil rights guaranteed by the United States Constitution.

Eliminating the conclusionary statements of petitioner contained in his complaint, we find that the only acts alleged to have been committed by the individual defendants may be summarized as follows (R 3-18):

Richard M. Van Steenberg, as District Judge of Morrill County, Nebraska, tried plaintiff, in absentia, for contempt of court, on a complaint filed by Clarence S. Beck; then Attorney General of the State of Nebraska, and sentenced plaintiff to serve a term of nine months in the Nebraska State Penitentiary at hard labor and imposed a fine of $2,500.00.

Virginia A. Schuetz, as Clerk of the District Court of Morrill County, Nebraska, based upon the judgment entered in said court by Richard M. Van Steenberg, District Judge, issued an Order of Commitment, directed to the sheriff of said county, to execute the sentence and order of the District Court.

James L. Macken and *Norval Houston* directed the Sheriff of Cheyenne County, Nebraska, to arrest

plaintiff pursuant to the Order of Commitment issued by the Clerk of the District Court of Morrill County, Nebraska. Plaintiff was released from this arrest by virtue of a Writ of Habeas Corpus issued out of the District Court of Cheyenne County, Nebraska, on January 16, 1961. The order of said court, set forth in the Complaint, discloses on its face that the arresting officer did not have in his possession a copy of the "Order of Commitment," but merely a copy of the judgment entered by Richard M. Van Steenberg in the District Court of Morrill County, Nebraska (R 10 and 33).

James L. Macken, County Attorney of Morrill County, *Norval Houston,* Sheriff of Morrill County, Nebraska, *Michael Linch,* Deputy Sheriff of Morrill County, Nebraska, and *Leo Knudtson,* a member of the Nebraska State Safety Patrol, pursuant to the Order of Commitment issued out of the District Court of Morrill County, Nebraska, re-arrested plaintiff in Cheyenne County, Nebraska, and transported him to the Nebraska State Penitentiary at Lincoln, Nebraska.

Maurice Sigler, Warden of the Nebraska State Penitentiary, and *John Greenholtz,* Deputy Warden of the Nebraska State Penitentiary, held plaintiff a prisoner in the State Penitentiary, under the Order of Commitment issued by the District Court of Morrill County, Nebraska, and during his incarceration, plaintiff alleges numerous acts committed by said defendants in violation of his civil rights.

George Turner, as Clerk of the Supreme Court of Nebraska, was given a demand by plaintiff to direct a release of plaintiff from his imprisonment.

The above are the only defendants against whom any specific acts are charged and no overt acts are charged with reference to any of the other defendants. Such other defendants are included only in the general conclusionary statements of the plaintiff, which are without any basis in fact.

In the First Cause of Action it is alleged "that the actions of the defendants were done with the intent by the defendants to deny the plaintiff, Paul E. Rhodes, the equal protection of the laws and with the intent to injure him and deny him the equal protection of the laws in that the individual defendants planned and agreed to commit all of the acts alleged herein under the circumstances alleged herein."

In the Second Cause of Action, the allegation above referred to is incorporated as a part thereof and, in addition, it is alleged in Paragraph XII as follows: "prior to the events alleged in Paragraph one to eleven of this count, the individual defendants excepting only the Justices of the Supreme Court entered into a conspiracy with each other, with the purpose of impeding, hindering, obstructing, or defeating the Courts of Justice of the State of Nebraska, with intent to deny the plaintiff Paul E. Rhodes equal protection of the laws and with the intent to injure him for enforcing or attempting to enforce his rights to equal protection of the laws the individual defendants planned and agreed to commit all of the acts alleged herein under the circumstances alleged herein."

The Judges of the Supreme Court are expressly exempted from the First and Second Causes of Action and the prayer with reference to each such Cause of

Action is for judgment in the amount of $2,100,000.00. The First Cause of Action appears to be brought against the defendants because of their individual acts and the Second Cause of Action attempts to allege a conspiracy between all of the named defendants, except the Judges of the Supreme Court.

The Third Cause of Action is for an injunction against the defendants and each of them from violation of the plaintiff's civil rights, rights, privileges and immunities as hereinabove set forth and guaranteed by the Constitution of the United States of America."

The matter above quoted from the First Cause of Action is incorporated in the Third Cause of Action but not the quotation from the Second Cause of Action. In addition, it is alleged that the members of the Supreme Court, Robert G. Simmons, Edward F. Carter, Fred W. Messmore, John W. Yeager, Harry Spencer, Leslie Boslaugh, Robert C. Brower and George W. Turner "now threaten along with the other defendants and to plaintiff's information and belief, will, unless restrained and enjoined, commit or suffer to be committed further violation of the civil rights, privileges and immunities of the plaintiff, by causing his apprehension and incarceration in the Nebraska State Penitentiary at hard labor."

I.

A Complaint Under the Civil Rights Act Must State Sufficient Facts to Show That Plaintiff Is Entitled to Relief.

A complaint must contain a short, plain statement of the claim, which shows that plaintiff is entitled

to relief and this requirement is not met by general allegations and mere conclusions that the constitutional rights of plaintiff have been violated.

Rule 8, Federal Rules of Civil Procedure, states, in part, as follows:

> "(a) *Claims for Relief.* A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . ."

Rule 8, however liberally construed, does require that the pleader show that he is entitled to relief, and more than generalities are required to conform to said Rule. *Agnew v. City of Compton,* 239 F. 2d 226 (1956). Where the claim under the constitution or federal statutes clearly appears to be colorable, or made solely for the purpose of creating federal jurisdiction over what would otherwise be an action to vindicate a right arising only under state law, and no substantial facts establishing federal jurisdiction are alleged, mere conclusions asserting the violation of constitutional rights are insufficient. *Yglesias v. Gulf Stream Park Racing Association, Inc.*, 201 F. 2d 817.

II.

The Doctrine of Immunity Extends, in This Case, to the Judges, Prosecuting Attorneys, Clerks, Wardens, Penal Institution Officers and Employees, and Law Enforcement Officers, Defendants in the Action.

The doctrine of judicial immunity has not been abrogated by the Civil Rights Act and creates an absolute immunity where the law invests jurisdiction

in the Judge, or in the Court, over the subject matter. *Tenney v. Brandhove,* 341 U. S. 367, 71 S. Ct. 783, 95 L. Ed. 1019; *Tate v. Arnold,* 223 F. 2d 782; *Francis v. Crafts,* 203 F. 2d 809; *Niklaus v. Simmons,* 196 F. Supp. 691.

The doctrine of judicial immunity is applicable to prosecuting attorneys, such as the Attorney General, his assistants, and County Attorneys. *Cawley v. Warren,* 216 F. 2d 74; *Morgan v. Sylvester,* 125 F. Supp. 380; *Yaselli v. Goff,* 12 F. 2d 396; *Niklaus v. Simmons,* 196 F. Supp. 691.

It is also applicable to clerks of courts, *Ginsburg v. Stern,* 125 F. Supp. 596; *Niklaus v. Simmons,* 196 F. Supp. 691, and extends to penitentiary wardens, penal institution officers and employees, and law enforcement officers. *Francis v. Lyman,* 216 F. 2d 583; *Eaton v. Bibb,* 217 F. 2d 466; *Blythe v. Ellis,* 194 F. Supp. 139; *Thompson v. Baker,* 133 F. Supp. 247.

The rule of absolute immunity finds its basis in many cases, but particularly in *Tate v. Arnold,* 223 F. 2d 782; *Francis v. Crafts,* 203 F. 2d 809; and *Niklaus v. Simmons,* 196 F. Supp. 691. The reason for the rule is sound. Illustrations of the frustration which would plague a law enforcement officer if this were not true are many. Probably the most important reason why such immunity exists is because it is basic to our democratic republic that a court of law, rather than the highest executive officer involved, is the body which decides controversies and gives effect to written, or unwritten, law. Basic to our beliefs is that we can appeal to a judicial officer from the actions of an executive or legislative power. In our courts we have placed the most

grave responsibility and they must be free to shoulder it. Because a court in itself is not at once a law enforcement organ, a penal institution, and a prosecuting and defense combination, it is necessary that immunity extend to those officials necessary to the proper function of our judiciary.

Petitioner gives great weight to the recent case of *Monroe v. Pape*, 365 U. S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473. This case is, of course, entitled to such in applicable situations where it is on point. A review of the facts in the *Monroe* case reveals that Mr. Monroe, his wife and children were routed out of bed by thirteen Chicago police officers in violation of proper Illinois procedure and forced to stand nude while the officers literally tore the abode apart. Mr. Monroe was then taken to headquarters and interrogated without being presented to a magistrate. The question in the *Monroe* case was this: "May acts done in violation of state law be 'under color of state law' in accordance with the language of the Civil Rights Act?" This question was answered in the affirmative.

Compare the above facts with those in the instant case. Each act complained of was done in accordance with a court order valid on its face. There is no application of the *Monroe* case to the *Rhodes* case. The various judges joined herein are shown to be immune from this type of action. No other defendants can be shown to have acted in violation of Nebraska law. Therefore, the immunity afforded judges is the prime block to Mr. Rhodes' action and it should be held to extend to the other defendants in this case or it may as well not exist. In each of the individual defendants' cases, an act necessary to

the execution of a court order was being performed. None was in violation of the laws of the State of Nebraska. Since no liability exists on the part of any of the individuals involved, none can exist against the defendant bonding companies.

In conclusion it may be said that the lack of jurisdiction was never a factor in this case. No judge performed an act outside the scope of his judicial duties. No clerk tried to exercise the powers of a judge or penal officer, nor did any attorney do anything but perform his statutorily prescribed duty. No defendant can be said to have done anything which was the duty of some other officer. The cases cited above are explicit on the point that immunity exists for acts done within the scope of one's authority.

Judge Van Pelt's Opinion contains a detailed analysis of the facts set forth in the Complaint and correctly finds that the District Court of Morrill County had jurisdiction of both the person of petitioner and the subject matter of the action, and that therefore, the doctrine of immunity extends to all of the defendants, which findings were adopted by the Circuit Court. We submit that no other conclusion can be reached in this case.

III.

The Constitutional Rights Which Petitioner Claims Were Violated by the Respondents Are Either Not Applicable to Contempt Proceedings or Are Rights Which May Be Waived, Either Expressly or by Acts of the Defendant.

Petitioner consistently refers to his trial being in absentia, but the record discloses that he was pres-

ent in person and represented by an attorney during two days of the trial (R 30) and that only a minor portion of the trial was conducted in his absence. This does not, however, raise any constitutional questions, since in a trial for contempt, the right of the defendant to be present at the trial is one which may be waived, and such waiver may be by the acts of the defendant, and not necessarily an express waiver. *Middlebrook v. State*, 43 Conn. 257, 21 Am. Reports, 650; *Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405, 9 S. Ct. 77.

Even in a felony case, the majority rule is that the right of the defendant to be present during all stages of the trial is one which may be waived. 14 Am. Jur. 905, Criminal Law, Sec. 199. Also in misdemeanor cases, many states have express statutes authorizing a defendant to waive his rights to be present during trial and sentence.

Petitioner also complains that he was denied a jury trial and the right to be confronted by the witnesses against him. These constitutional guarantees, however, have no application to contempt proceedings. *State ex rel. Wright v. Barlow*, 132 Neb. 166, 271 N. W. 282; *State v. Lush*, 168 Neb. 367, 95 N. W. 2d 695 (1959).

Petitioner takes the position that his sentence to the Nebraska State Penitentiary is void because the sentence subjects him to infamous punishment, and is therefore in violation of the Federal Constitution. There is nothing in the United States Constitution with reference to infamous punishment. Slavery and involuntary servitude is prohibited, as

is cruel and unusual punishment. However, placing a man in the penitentiary is not cruel and unusual punishment, because if it were; not even murderers could be sentenced to the penitentiary.

The same argument presented by the petitioner with reference to this question was before the court in the case of *U. S. v. Green*, 140 F. Supp. 177, affirmed 241 F. 2d 631, affirmed 78 S. Ct. 632, 356 U. S. 165, 2 L. Ed. 2d. 672, and was overruled by the court, sustaining a sentence of three years in the penitentiary for constructive criminal contempt.

The inclusion in petitioner's sentence that his imprisonment should be "at hard labor" is admittedly erroneous, but this portion of the sentence would clearly have been stricken by the Nebraska Supreme Court if petitioner had completed his error proceedings, as demonstrated by *Smolczyk v. Gaston*, 147 Neb. 681, 24 N. W. 2d 862, where the court modified the sentence imposed by eliminating therefrom "at hard labor" contained therein. However, petitioner has not been required to serve any part of his sentence at hard labor (R 52-54) and that portion of his sentence became a nullity.

Petitioner next contends that his civil rights were violated because of his arrest without a warrant. The complaint shows on its face, however, that he was taken into custody by virtue of a sentence and commitment issued out of the District Court of Morrill County, Nebraska.

When a judgment of conviction is entered and sentence imposed by the court, no further order of the

court is required by Nebraska law in order to carry the judgment into effect. When such judgment is filed with the Clerk of the Court, it becomes the ministerial duty of the clerk to issue the "order of commitment." In the contempt proceedings had in the District Court of Morrill County, this mandatory duty was performed by the clerk on November 23, 1960, two days after the entry of judgment (R 7). Thereafter the rights of Petitioner were fully protected, if he believed that any of his rights had been violated and desired to present these matters to the Supreme Court of Nebraska.

By the provisions of Sec. 29-2301, Reissue Revised Statutes Nebraska 1943, Petitioner was entitled to make application to the court for an order suspending the execution of the sentence for one month in order to apply for a writ of error. He was then entitled to remain at liberty on bail. Upon filing the petition in error and transcript of the proceedings of the District Court with the Clerk of the Supreme Court, an automatic suspension of sentence is issued by the Clerk of the Supreme Court, pending the termination of the error proceedings, and Petitioner was entitled to bail during said period.

Petitioner proceeded with his error proceedings pursuant to the statutes, but failed to post bail, and therefore was not entitled to his liberty while these proceedings were pending. It was therefore the duty of the sheriff of Morrill County to take Petitioner into custody until such time as bail was provided. Petitioner's contention that he could not be taken into custody, after trial and sentence, without a warrant for his arrest, is entirely without merit. The

order of commitment is all that Nebraska law requires. His deliberate refusal to apply for or post bail during this period was the reason for his incarceration from January 23, 1960, to August, 1960, when he did furnish bail and was released until the error proceedings were dismissed because of his failure to file his brief or take any further action before the Supreme Court of Nebraska.

IV.

A Judgment in a Habeas Corpus Action Is Res Judicata Only As To The Particular Matters Considered by The Court Issuing The Writ.

The Order of the Cheyenne County Court, set forth in the complaint, discloses that petitioner was granted the Writ of Habeas Corpus because of the fact that the only document which the Sheriff had in his possession, as a basis for his arrest, was a copy of the Order of the District Court of Morrill County, and not the order of commitment issued by the Clerk (R 33-34). This could in no manner constitute a bar to his subsequent arrest. All that the Court determined therein was that the judgment and sentence of the District Court of Morrill County was not a warrant or commitment, and therefore insufficient for arrest of petitioner by the Cheyenne County Sheriff. The principle of res judicata does not apply, in cases of habeas corpus, to a judgment discharging the prisoner where a new state of facts warranting his restraint is shown to exist, different from that which existed at the time the first judgment was rendered. Annotation 62 A. L. R. 465.

At the time of the re-arrest of petitioner, the Sheriff did have in his possession the commitment issued out of the Morrill County Court, and the arrest of petitioner was in accordance with established Nebraska law.

CONCLUSION

The analysis of the facts made by the District Court, and affirmed by the Court of Appeals, is clearly correct. The conclusions of law set forth in the Opinion are supported by the decisions of this Court and Petitioner has failed to disclose any conflict between the Circuits on these questions. No question is therefore presented which will justify the granting of a Writ of Certiorari herein.

Respectfully submitted,

CLARENCE A. H. MEYER
Attorney General, State of Nebraska
ROBERT A. NELSON
Special Assistant Attorney General,
State of Nebraska
Counsel for Respondents

PROOF OF SERVICE

I, Robert A. Nelson, one of the attorneys for respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on January 24, 1963, I served copies of the foregoing Brief in Opposition to Petition for Certiorari to the United States Court of Appeals for the Eighth Circuit upon Petitioner by depositing the same in a United States mail box, with first class postage prepaid, addressed to Mr. Paul E. Rhodes, Howe, Nebraska, such being the post office address of said Petitioner.

Robert A. Nelson

ROBERT A. NELSON
P. O. Box 2028
605 South 14th Street
Lincoln, Nebraska
One of the Attorneys for Respondents

Office-Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 675

October Term, 1962

PAUL E. RHODES,

Petitioner,

vs.

NORVAL HOUSTON, et al.,

Respondents.

PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PAUL E. RHODES, *pro se*,
Howe, Nebraska.

GANT PUBLISHING CO., Lincoln, Nebraska

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Howe, Nebraska.

ARGUMENT

Arrest without warrant violates Fourth Amendment of the United States Constitution and the rule of Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081.

It is noted on page 15 in brief of respondents that they rely on criminal procedure in contempt proceedings, Sec-

tion 29-2301, Reissue Revised Statutes of Nebraska 1943 which is a felony criminal procedure statute. If they would have merely looked at succeeding Section 29-2303, Reissue Revised Statutes of Nebraska 1943 quoted in full in petitioner's Petition at page 37 of Appendix they would have noticed and this Court will note that a commitment is not a warrant for the purpose of arrest and is no authority for arrest and that the court must order the convicted person into the custody of sheriff. The complaint alleges (R. 7, R. 8, R. 20):

> "* * * in complete absence of any mittimus or other direction by the District Court issued and 'Order of Commitment' * * *."

Respondents completely ignoring statute 29-2303 supra:

> "* * * it shall be duty of court to order person so convicted into the custody of the sheriff. * * *"

Clearly demonstrating that it is the court, judge, that must order the accused into custody. The said statute 29-2303 Complaint (R. 20) goes on further to clearly demonstrate a commitment is not a warrant by which the sheriff can deprive an accused of his liberty by containing the following language:

> "* * * if a person so convicted shall escape, the jailer or other officer from whose custody the escape was made may return to the clerk of the proper court the writ by virture of which the convict was held in custody, with information of the escape endorsed thereon, whereupon clerk shall issue a warrant stating such conviction, and commanding the sheriff of the county to pursue such person into any county in the state; and the sheriff shall take such person and commit him to the jail of the county. * * *"

Also see 29-2401, R. R. S. Nebr. 1943, p. 38, Appendix of petitioner's Petition.

Thus clearly showing respondents in pages 14 and 15 in their brief are mistaken as to the law when they say no court order or warrant is necessary by Nebraska law to deprive accused of his liberty.

Motion to dismiss admits constitutional violations alleged in complaint and respondents could not defeat the allegations by attaching false affidavits to motion to dismiss and going outside face of complaint.

The dangers of allowing the court and the respondents to go beyond the face of the Complaint in considering the Motion to Dismiss is contrary to this court's ruling in *Polk Co. v. Glover,* 305 U. S. 5, 59 S. Ct. 15 is clearly apparent by respondents' statements on pages 16 and 17 of their brief in case at bar.

The Complaint in the case at bar (R. 9) clearly alleges that the arrest on Jan. 16, 1961 was under color of "order of commitment", of the clerk of the District Court of Morrill County, Nebraska (R. 8). Therefore, when the respondents allege that the arrest of Jan. 16, 1961 was not by virtue of this order of commitment of the clerk of the District Court of Morrill County, Nebraska they are misstating the facts alleged in Complaint (R. 8, R. 9, R. 18) and further ignoring the order granting the writ (R. 9), the particular matters considered by the court were the matters alleged in petition for habeas corpus and respondents confusing the matters considered by the court issuing the writ with the Order of Discharge (R. 10). When the sheriff by his return (R. 40) attached a copy of the Order of Commitment of the clerk of the District Court of Morrill County (R. 8) and the same was determined by the court (R. 10) to be no order of commitment because the court, judge, had made no order pursuant to Section 29-2303, R. R. S. Nebr. 1943, quoted in full on page 37

of petitioner's Petition where the statute makes it the duty of the court and not the clerk thereof to order person so convicted into custody of the sheriff. The statute reads:

> "* * * it shall be duty of court to order person so convicted into the custody of the sheriff. * * *"

For the reason the Morrill County Court had not made such order, the clerk was without authority to issue the Order of Commitment (R. 8). For this reason the District Court of Cheyenne County, Nebraska, entered a second order on Jan. 16, 1961 not being the order of the matters considered in issuing the writ, for the reason the sheriff failed to meet the issues of the writ and the Petition on which it was granted (R. 9) for the reason the arrest was not by virtue of warrant or order of commitment. The commitment attached to the sheriff's return (R. 8) being issued by the clerk of the court without an order of the court (R. 7) was not a valid order of commitment, was a nullity, and stood for nothing so long as the court had not ordered the person convicted into the custody of the sheriff pursuant to Section 29-2303, R. R. S. Nebr. 1943.

Respondents attempt to dispute the record of the habeas corpus proceeding in the case at bar by claiming the sheriff's return is a false return to the writ of habeas corpus, ignoring Sections 29-2805, 29-2806, R. R. S. 1943, and 29-2819, R. R. S. 1943 Reissue, making the return *prima facie* true and therefore binding on the respondents in the case at bar.

To demonstrate the misstatements of the respondents in their brief pp. 16-17 with regard to Commitment (R. 8) of the Complaint a certified copy of the Commitment copy as attached to sheriff's return in Cheyenne County,

Nebraska, habeas corpus proceeding is furnished the Court with this reply brief to clarify the confusion and misstatements which have resulted from the respondents' contentions that said document did not exist, as part of the sheriff's return in the Cheyenne County habeas corpus proceeding as alleged by your petitioner (R. 9).

This demonstrates the dangers that exist and the confusions which result when the court goes beyond the face of the Complaint contrary to this court's ruling in *Polk Co. v. Glover*, supra.

The respondents attempt to and the Honorable Judge Van Pelt defeated the allegations of petitioner's Complaint (R. 13, 23). The petitioner was committed to hard labor (involuntary servitude), contrary to the fourteenth amendment of the United States Constitution by securing false affidavits of John Greenholtz and Maurice Sigler and attaching same to Motion to Dismiss (R. 52-54) which is contrary to leading decision of this court in *Polk Co. v. Glover*, supra, and contrary to rules in all Circuits except the Eighth requiring allegations of Complaint to be taken as true.

None of the acts of respondents in case at bar were done in accordance with court order.

Respondents on page 11 of their brief claim that all of the actions complained of by petitioner were done in accordance to court order fair on its face which is contrary to the allegations of petitioner's Complaint (R. 7 #V and R. 20 #IV, V). Petitioner specifically alleges:

IV

"That the Court, District Court of Morrill County, in Case No. 4819 never did order this plaintiff into the custody of the sheriff of Morrill County, Nebraska

in case No. 4819, after his discharge from custody on August 1, 1960, and subsequent discharges on habeas corpus on September 2, 1960, and January 16, 1961." "That Section 29-2303, R. R. S. Nebr. 1943, specifically provides a commitment is not a warrant with which the sheriff may use to deprive a person of his liberty and arrest without a warrant violates and is a deprivation of rights, guaranteed by Articles I, Sections 3 and 7 of the Nebr. Constitution and the IV and XIV Amendments to the Constitution of the United States of America."

Court's attention is directed to Section 29-2303, R. R. S., 1943 Reissue quoted in full on pages 37-38 of Appendix in petitioner's Petition in case at bar. Therefore the court having entered no order ordering petitioner in custody of sheriff, all actions of respondents in depriving this petitioner of his liberty and twice committing this petitioner to HARD LABOR is in violaton of state law and state Constitution as well as United States Constitution namely Article I, Sections 2 and 3 of Nebr. Constitution and Sections 29-2303, 29-2401, 29-2809, R. R. S. Nebr. 1943, Reissue 1956 and said statutes set forth in full on pp. 37, 38, 39, 40 on Appendix D in petitioner's Petition in case at bar.

The decision of Monroe v. Pape, 365 U. S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 has application to case at bar contrary to contentions of respondents, page 11 of their brief.

It is noted that Honorable Judge Van Pelt in his opinion (R. 72) 202 F. Supp. 634, relies on case of *Stift v. Lynch*, 267 F. 2d 237, and the same line of cases relied on by respondents on pages 10 and 11 of their brief to defeat the decision of *Monroe v. Pape*, supra, 81 S. Ct. 475.

It is clearly noted in case *Stift v. Lynch*, supra, the con-

flict between circuits is clearly pointed out by the following language to-wit:

> "Plaintiffs argue that the Federal Civil Rights Act gives a right of action to every individual whose federal rights have been trespassed upon under color of law, and that the statute makes no exception for judicial officers, quasi-judicial officers and law enforcing officers. Plaintiff points out that #1983 states that 'every person' shall be liable to the party injured. This argument finds support in Pickling v. Pennsylvania Railroad Co., 3 Cir., 151 F. 2d 240, 248, 250. The court there held that certain well-recognized common law immunities have been abrogated by Congress."

> "The views expressed in Pickling represent a minority view. The argument there made has been considered and rejected in the First, Sixth, Seventh and Eighth Circuits. Francis v. Craft, 1 Cir., 203 F. 2d 809; Kenney v. Fox, 6 Cir., 232 F. 2d 288; Cawley v. Warren, 7 Cir., 216 F. 2d 74 and Tate v. Arnold, 8 Cir., 223 F. 2d 782."

Conflict between circuits and the fact that decisions of courts below in case at bar are in conflict with leading decision of *Monroe v. Pape*, supra, by the following words from said opinion:

> "All defendants moved to dismiss, alleging the complaint alleged no cause of action under those acts or under the Federal Constitution. The District Court dismissed the complaint. The Court of Appeals affirmed, 272 F. 2d 365, relying on its earlier decision, Stift v. Lynch, 7 Cir., 267 F 2d 237. The case is here on certiorari *which we granted because of seeming conflict* of THAT RULING with our prior cases. 362 U. S. 926, 80 S. Ct. 756." (Emphasis supplied).

The United States Supreme Court by the majority opinion by Justice Douglas held that Congress had power to

enforce the Fourteenth Amendment and did so by the Civil Rights Act and did so by the following language:

> "There can be no doubt at least since Ex Parte Virginia, 100 U. S. 346-347, 25 L. Ed 676, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it. See Home Tel. Co. v. City of Los Angeles, 227 U. S. 278, 287-296, 33 S. Ct. 312, 314, 318, 57 L. Ed. 510. The question with which we now deal is a narrower one of whether Congress, in enacting #1979, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official abuse of position. Cf. Williams v. United States, 341 U. S. 97, 71 S. Ct. 576, 95 L. Ed. 774; Screws v. United States, 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495; United States v. Classic, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1386. We conclude it did so intend."

Above holding by the Court in *Monroe v. Pape* is complete overruling of the four holdings of court in *Stift v. Lynch*, 267 F. 2d 237 as follows to-wit:

1. "Liability under Federal Civil Rights Act does not apply to 'every person'. 42 U. S. C. A. 1983."
2. "State's attorney and assistant state's attorney were immune to action under Civil Rights Act for their actions in connection with official prosecutions. 42 U. S. C. A. 1981 et seq. 1983, 1985."
3. "Judges of courts of record and of general jurisdiction are immune from civil liability for acts done by them in exercise of their judicial functions. Federal Civil Rights Act."
4. At page 240: "Sheriffs and deputy sheriffs are immune to liability under the Federal Civil Rights Act."

The holdings of courts below in case at bar are in direct conflict with *Monroe v. Pape*, supra, and in accord with *Stift v. Lynch*, supra, which emphasizes conflict betweeen Circuits, *Pickling v. Penn. R. Co.*, 151 F. 2d 240, which is reason Court should grant writ of certiorari to straighten out conflict between circuits and the fact the Eighth Circuit is contrary to rulings of this Court and the fact that the Eighth Circuit needs to be so told is emphasized by *Baird v. Sexton*, 277 F. 2d 418, page 432:

> "At least, we so interpret the statute until Congress broadens them or until the Supreme Court tells us otherwise."

In the case at bar this Court should tell them otherwise.

Trial in absentia results whenever case proceeds to trial on its merits in the absence of the accused.

Respondents on pages 12 and 13 of their brief now try to dispute *trial in absentia* ignoring judgment of trial court (R. 7) to-wit:

> "* * * the defendant was not present and not represented by counsel. * * *"
> "* * * matter came on further to be heard on its merits. * * *"

Respondents on said pages ignore *In re Oliver*, 333 U. S. 257, 275, 68 S. Ct. 499, 507, 508, 509, 510, set out at page 22 of petitioner's Petition. Respondents further concede by quoting Nebraska criminal procedure statutes apply to contempt proceedings in Nebraska. Further ignoring that they violated due process procedural statutes 29-102, 29-2001, 29-2201, R. R. S. Nebr. 1943, Reissue 1956, positively requiring presence of accused at time of trial and sentencing. Said statutes set out in full in Appendix D of petitioner's Petition, p. 37. Therefore all of their actions—*trial in absentia*, arrest without warrant, forced to

serve said sentence at *hard labor twice*—all violates Nebraska statutes and Constitution as well as the United States Constitution.

Respondents' reference to Honorable Judge Van Pelt's opinion on page 12 of their brief that the court had jurisdiction for trial on the merits of contempt procedings *in the absence of the body of the accused* is a finding absolutely contrary to procedural due process guaranteed by the United States Constitution. *Love v. State*, 71 Tex. Crim. 259, 158 S. W. 532:

> "The court had no power or authority to try one accused of a misdemeanor, in his absence, over his attorney's protest and objection for him, if he was sick, and absent on that account, his case should not have been forced to trial. If the court was satisfied that he was feigning illness, or was not in fact sick, so as to prevent his appearance, he should have forfeited his bond, issued another writ for his arrest, and had the accused brought into court, and then proceeded with the trial."

Therefore this court should grant this writ fully explaining to Eighth Circuit Court procedural due process as above set out in *Love v. State*, supra, and clearly explain to said Circuit Court that *in a criminal contempt proceeding the court has no power, authority, jurisdiction in absence of body of accused.* The doctrine is further explained in *Mylius v. McDonald*, 61 W. Va. 405, 56 S. E. 602, 10 A. L. R. N. S. 1098, 11 Ann. Cas. 812:

> 'The record shows no presence of Mylius at the time when the order of arrest and imprisonment was made. Its construction is that he was absent. It must show his presence. As stated above, a proceeding for contempt is a criminal proceeding. Judgment of imprisonment cannot be rendered in the absence of the person. * * * The judgment of imprisonment, having been rendered in the absence of Mylius, is utterly *void*,

because the authorities just cited show that the judgment of imprisonment must be in the presence of the accused. A court may impose a fine in his absence. It may try him after legal notice for a misdemeanor, without his presence; but never can it impose imprisonment without his presence. *It must by proper process, get him before the court in BODY.* That process, in case of contempt, is called an 'attachment,' which is used in chancery language, only as another word for common-law 'capias.'"

CONCLUSION

The analysis of facts made by the District Court and confirmed by the Court of Appeals does not correctly state the facts as the printed Record furnished this court shows and pointed out in petitioner's Petition and Reply Brief. The conclusions of law and said opinions are in conflict with the opinions of this court, contrary to Nebraska statutes, and in conflict with decisions of courts of appeal opinions in third and fifth circuits. Vital constitutional rights are at issue in this case and if Judge Van Pelt's opinion is allowed to stand as the law of the land, vital constitutional rights of everyone are lost, namely right to trial by jury, right to confrontation of witnesses, guarantees against trial in absentia, thirteenth amendment is abolished, citizens may be subjected to involuntary servitude without conviction of a crime, habeas corpus is abolished, the Motion to Dismiss substituted for an Answer resulting in petitioner's Complaint being defeated by affidavits without a trial.

The Court should grant the writ of certiorari to consider these vital constitutional questions in which every citizen of the United States has an interest.

Respectfully submitted,
PAUL E. RHODES, *pro se*,
Howe, Nebraska.